Filed 12/8/08 Hong v. Grant CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JUAN HONG, Plaintiff and Appellant, v. STANLEY GRANT et al., Defendants and Respondents.	G039959 (Super. Ct. No. 06CC09391) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail Andrea Andler and Andrew P. Banks, Judges. Affirmed.

Juan Hong, in pro. per., for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Richard A. Paul, Sandra L. McDonough and Michael J. Etchepare for Defendants and Respondents.

* * *

Plaintiff Juan Hong brought this action after his complaint under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.; Act) was denied by defendant The Regents of the University of California (university) based on acts by defendants Stanley Grant, Nicolaos Alexopoulos, Herbert P. Killackey, and Michael R. Gottfredson. He appeals from a judgment resulting from the sustaining of a demurrer to his cause of action for damages under the Act and denial of his petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5. (All further statutory references are to this code unless otherwise stated.) Because the complaint showed on its face that the university timely acted on his whistleblower's complaint, plaintiff is not entitled to damages under Government Code section 8547.10 and the court correctly sustained the demurrer. Moreover, administrative mandamus does not lie to review denial of plaintiff's whistleblower complaint because a hearing on that complaint was not required by law. As a result, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff has been a professor in the chemical engineering and materials science department at the University of California, Irvine since 1987. Between December 2002 and May 2004 plaintiff reported in writing to defendants Grant (department chair), Alexopoulos (engineering school dean), Killackey (academic personnel vice provost), and Gottfredson (executive vice chancellor and provost) criticisms of two professors and the activity of one of the schools at the university and also of activities of two of these defendants. The criticisms included charges that a professor had illegally secured state funds, that the engineering school wasted money by hiring lecturers without reviewing their qualifications, and that a professor had obtained merit increases by misrepresenting his accomplishments and credentials. Plaintiff also criticized Grant and Alexopolous for failing to act on his earlier complaint about the

professor who had obtained the merit increases and their appointment of a professor without consulting other members of the department.

In July 2004 the university began plaintiff's review for a merit salary increase. He was evaluated for his performance during the period October 2000 to September 2004. In March 2005 the faculty decided to take "No Action," denying a raise or promotion. The reason for the decision was plaintiff's "unacceptable" cessation of research. Grant was directed to work with plaintiff to prepare a remediation plan for plaintiff to initiate a research program, seeking outside funding. Plaintiff's teaching load was increased "given the lack of scholarly contributions." Plaintiff was notified of and agreed to the additional classes in February before the final evaluation was issued.

In November 2005 plaintiff filed a whistleblower retaliation complaint with the university's designated officer naming the individual defendants. He alleged that the negative review was a result of his criticism of defendants' inaction in response to his allegations of improper conduct by other faculty members and by the individual defendants themselves. The complaint was sent to the university's acting provost, Wyatt R. Hume. Pursuant to the University of California's Whistleblower Protection Policy (policy), which is "derived from the . . . Act," Hume appointed Ellen Switkes, Assistant Vice President for Academic Advancement in the Office of the President, as the retaliation complaint officer.

In conducting her investigation into the complaint in accordance with the policy, Switkes interviewed plaintiff and all university personnel involved, including the individual defendants, and also reviewed documents attached to plaintiff's complaint, his merit review file, and university policies. After completing her investigation Switkes concluded that denial of plaintiff's merit review and accompanying recommendations were not the result of retaliation because the individual defendants "were wholly unaware of the whistleblower complaint until long after the merit review was complete." Rather,

"the overwhelming and unanimous support for the merit denial, through many layers of review[,] negates any possibility that the chair or the dean acted in retaliation . . . ."

As required by the policy Switkes forwarded her report to Hume, the final decision-maker. Hume notified plaintiff by letter that after he had "carefully reviewed her report and . . . conclude[d] there is no credible evidence which supports your allegations of retaliation. Because the whistleblower activity engaged in by you occurred after the dates of the personnel actions about which you complain, those personnel actions could not have been taken in retaliation for the protected activity. I am hereby dismissing this complaint and closing the file." The letter also stated the decision was final and plaintiff had no right to appeal within the university whistleblower process.

Plaintiff then filed a combined petition for writ of mandate under both section 1085 and section 1094.5 and a complaint for violation of his right to privacy and damages under the Act. The court sustained defendants' demurrer to the cause of action for damages without leave to amend under Government Code section 8547.10, subdivision (c), which bars such an action where the university has acted timely in reviewing and acting on a whistleblower complaint. The complaint alleged a timely resolution on its face.

After plaintiff filed his second amended petition for a writ of mandate under sections 1085 and 1094.5 and his second amended complaint for violation of his right to privacy, defendants filed their opposition to the writs. The court denied both writs. Plaintiff did not appeal from the denial of the section 1085 writ. As to the writ of administrative mandamus, the court ruled it was not an available remedy because the whistleblower proceedings at issue did not require a hearing, a prerequisite to a claim under section 1094.5.

The court found that even if a writ was appropriate, it would deny the petition for two reasons. First, plaintiff claimed he was denied a fair hearing because Switkes refused to provide him with certain things, including a schedule of interviews

and the topics to be discussed with each witness, information as to affirmative defenses, and a statement of evidence relied on. In addition plaintiff alleged Switkes denied him discovery, thereby impeding his opportunity to cross-examine the witnesses. But these processes are not available under the policy. Rather, the court found, they apply to another procedure of which plaintiff did not avail himself.

Second, plaintiff argued that university denied his whistleblower complaint on the sole ground that the alleged retaliatory conduct took place before the complaint was filed. The court agreed that not all of the whistleblower activity occurred after the denial of his merit increase but found that the university's decision was also based on a lack of evidence of retaliation.

The court subsequently granted defendants' motion for summary judgment as to the privacy claim, which plaintiff did not appeal.

DISCUSSION

1. Demurrer to Whistleblower Cause of Action

The court did not err in sustaining the demurrer to plaintiff's cause of action for damages under the Act without leave to amend. Government Code section 8547.10, subdivision (c), which provides for damages under the Act, limits their recovery as follows: "[A]ny action for damages shall not be available . . . unless the injured party has first filed a complaint with the [designated] university officer . . . and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents." The California Supreme Court recently construed this statute and concluded the language is clear on its face that unless the two criteria are satisfied, an action for damages will not lie. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888-889.)

Plaintiff alleged that he filed a complaint with the university officer designated to accept whistleblower complaints and that the university's decision was timely. These two facts, which we accept as true in evaluating a demurrer (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543), bar his recovery of damages.

Plaintiff's arguments as to exhaustion of judicial remedies and the propriety of combining a petition for writ of mandamus with a complaint for damages are not relevant. No matter what the court might decide on a writ petition, plaintiff cannot prevail on an action for damages under the Act.

The cases he points to, *Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921, *California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, *Ahmadi-Kashani v. Regents of the University of California* (2008) 159 Cal.App.4th 449, and *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, provide no authority to the contrary. They deal with the requirement to challenge an administrative decision before filing an action for damages and application of collateral estoppel and res judicata where that requirement is not fulfilled, not the issue here. And *Brand v. Regents of the University of California* (review granted May 14, 2008, S162019), cannot be cited.

2. Unavailability of Administrative Mandamus Under Section 1094.5

Administrative mandamus will lie to challenge a decision arising out of a proceeding only where, by law, an evidentiary hearing is required and fact-finding lies within the discretion of the decision-making body. (§ 1094.5, subd. (a); *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848 see *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1729 ["it is the *requirement* of a hearing and taking of evidence—not whether a hearing is actually held and evidence actually taken—that triggers the availability of mandamus review"].) Plaintiff has not shown a hearing was required by law.

First, nothing in the Act itself mandates a hearing. (Gov. Code, § 8547.10.) Neither do the procedures under which plaintiff's complaint was evaluated. The University of California policy requires a factfinder to be appointed. The factfinder must provide the accused with a copy of the complaint and any other documents on which the factfinder will rely, giving him the opportunity to respond. The factfinder then makes a report to the appropriate university officer, who makes the final decision and informs the complainant.

The university's Administrative Policies & Procedures (local implementation procedures), also based on the Act, are similar. They list the factfinder's duty to investigate, which may include conducting interviews with the accused, the complainant, and witnesses, obtaining relevant documents, providing the accused with "copies of all non-privileged documents on which the findings rely" and giving him the opportunity to respond, and making a report to the chancellor.

Because no hearing is required (and none was held), administrative mandamus does not lie. That another procedure for a different grievance process within the university provides for a hearing is not relevant. As the writ petition and record show and as the court found, plaintiff did not use that process.

Although unclear, plaintiff may be claiming that the requirements set out in the policy and the local implementation procedures constitute a hearing because the university was "required by law to accept and consider evidence from interested parties before making its decision." (Bold and italics omitted.) We disagree.

"Section 1094.5 contemplates an adversarial hearing grounded in due process. Thus, *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776 . . . held a trial court erred in applying section 1094.5 review to a university's decision to deny tenure to a . . . professor. He was reviewed by a variety of committees, with input from [his] department and 'outside reviewers,' but he 'had no due process rights to a full adversarial hearing on denial of tenure.' [Citation.]" (*300 DeHaro Street*

Investors v. Department of Housing & Community Development (2008) 161 Cal.App.4th 1240, 1251.) The court there held there was no legal requirement for a hearing, in part because the plaintiff had no opportunity for rebuttal.

Here, the factfinder's activities in reviewing the complaint, interviewing witnesses, and reviewing documents do not transform the process into a hearing as required under section 1094.5. As the trial court found, plaintiff did not receive notice of the evidence the factfinder considered, nor was there a record of any interviews conducted for the court to review. Further, plaintiff had no right to examine witnesses or offer rebuttal nor any "'due process rights to a full adversarial hearing on denial'" of his complaint. (*300 DeHaro Street Investors v. Department of Housing & Community Development*, *supra*, 161 Cal.App.4th at p. 1251.)

As a corollary, we reject plaintiff's argument the court should have ruled that a hearing was required. In this section plaintiff broadly quotes from the policy and the University of California academic senate rules, setting out the procedure for filing complaints, partly in an attempt to support his point that the court misunderstood the complaint process. But this argument has no bearing on the outcome of this decision. We repeat—the process under which plaintiff proceeded did not require a hearing.

Plaintiff emphasizes part of a sentence in the policy that discusses the evidentiary standard to be used by a committee, hearing officer, or arbitrator that "hears a retaliation complaint." (Bold and italics omitted.) He makes no argument about that part of the policy, but assuming he is contending this language somehow mandated a hearing, we disagree. In the context of the entire document, "hearing" a complaint must be interpreted to mean investigating and reaching a decision, not conducting a "hearing" that would satisfy the requirements of section 1094.5.

Plaintiff also relies on *Ohton v Board of Trustees of California State University* (2007) 148 Cal.App.4th 749 in support of his claim a hearing by the university was required by law. That case involved a whistleblower complaint brought by a coach

against California State University (CSU). The trial court granted summary judgment on the basis that the defendant had timely acted on the plaintiff's complaint. The court of appeal reversed to give the plaintiff the opportunity to amend to add a writ petition. (*Id*. at p. 771.)

The whistleblower statute governing CSU employees differs from Government Code section 8547.10, which applies here, in one major respect. It provides that the complainant may seek a civil remedy if CSU has not "satisfactorily addressed" the complaint. (Gov. Code, § 8547.12, subd. (c).) The court did not interpret the meaning of that phrase but did specifically state that section 8547.12 did not "'guarantee' the complainant a civil remedy." (*Ohton v. Board of Trustees of California State University, supra*, 148 Cal.App.4th at p. 765.)

The court also set out the general rules about the availability of writs and did allude to use of administrative mandamus. (*Ohton v. Board of Trustees of California State University, supra,* 148 Cal.App.4th at p. 766.) But it did not hold administrative mandamus was available in that case and certainly did not state it would be available here under a different statute. Because the reversal was on procedural grounds, the court did not even decide that issue. But it did reiterate the rule that a prerequisite to administrative mandate is the requirement that a hearing be held by the agency. (*Id*. at p. 766.) It did not reach the question of whether CSU procedures satisfied the hearing requirement. Therefore, *Ohton* does not control.

Plaintiff's lengthy comparison of Government Code sections 8547.10 and 8547.12 does not make them identical and does not change the fact that no hearing is required in plaintiff's case.

Further, the record demonstrates that plaintiff received fair process in the determination of his whistleblower complaint. As plaintiff himself admits, the university followed the procedures set out in the policy in appointing a factfinder. Switkes investigated pursuant to the provisions of the policy and made her report. It was detailed

and lengthy, encompassing nine single-spaced pages covering all the charges plaintiff made, steps she took to investigate, the information she ascertained, her analysis, and her conclusions. The report was sent to Hume who made the final decision and advised plaintiff in writing.

For all these reasons, administrative mandamus does not lie.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.